Supreme Court of the United States

OCTOBER TERM, 1958

No. 439

JACKSON D. MAGENAU, Administrator of the Estate of Norman Ormsbee, Jr., deceased,

Petitioner,

v.

AETNA FREIGHT LINES, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR RESPONDENT

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I.

1. Both in his main brief and reply brief, Petitioner totally misconceives Respondent's position in the following essential respect: Granting that ordinarily the defense that plaintiff was an employee of the defendant and hence relegated to his Workmen's Compensation remedies would be an affirmative defense in a diversity action based on negligence, here *Petitioner* abandoned his original theory of "guest passenger" set forth in his Complaint, and at the trial proved all of the circumstances giving rise to the emergency hiring of decedent Ormsbee in order to escape

the consequences of his being held a trespasser as to Respondent.

Therefore, Petitioner elected as part of his own case, to show all of the circumstances surrounding how Ormsbee came to be on the truck, namely, that he was hired for $25.00; that the hiring was necessitated by an emergency—past mechanical and brake trouble and the expectation of more—that the hiring was in the furtherance of Defendant's interests; and that Ormsbee was employed as the driver's helper or assistant, not for just a few minutes, but for the whole balance of the trip.

Admittedly the first interrogatory submitted to the jury did not contain all of the foregoing facts, but it must be considered in the light of the Trial Judge's explanation and instructions at the time he submitted it. In accordance with Federal Rule 49(b) the Court gave such explanation and instruction with reference to the first interrogatory—the same appearing at page 184 of the Record and printed on pages 13-14 of Respondent's main brief.

In short, the jury was expected to consider the following elements when answering the first interrogatory as explained by the Court: Whether Ormsbee was hired in the furtherance of Defendant's interests by reason of unforeseen emergency of such a nature that Schroyer was unable to perform his duties for the continuance of the trip; that only in such event could Schroyer engage an assistant for the remainder of the trip.

Accordingly it is Respondent's position that Petitioner, in proving the circumstances surrounding the emergency employment of Ormsbee likewise proved the factual basis of such emergency employment being in the regular course of Respondent's business, as to which there was no dispute,

since all of the evidence thereof was submitted by Petitioner.

The Trial Court clearly showed that he sensed Petitioner's difficulty, when he stated, at the time of requests for instructions, to Petitioner's counsel (166a):

> "You fellows are in a little bit of a dilemma. You want the jury to find he hired him or engaged him, therefore you touch, you draw yourselves near to this employee's situation, see."

Accordingly, we submit that Judge Goodrich was correct when he said:

> "We cannot escape the conclusion that the *finding* that authorized the hiring of Ormsbee put him into the regular business of the defendant, namely, transportation of goods by truck. If that was not what he was doing, he had no business riding with Schroyer at all."

2. In his reply brief, Petitioner states:

> "Respondent makes no effort to explain why the Court of Appeals relied on Skinner * * *"

But that Court likewise relied on *Callihan vs. Montgomery*, 272 Pa., 56, where the Supreme Court said, at page 62:

> "Whether on the *state of facts found*, he (plaintiff's decedent) was killed in the course of his employment, and also whether the employment was 'casual in character and not in the regular course of the business of the employer' within the meaning of these several phrases as used in the Act, are questions of law, and, as such, open to review."

Accordingly, Respondent reiterates that what the Court of Appeals did upon review, was not to ignore the jury's finding, but to hold that it was predicated upon a factual basis sufficient, as a matter of law, to constitute an emergency hiring in the regular course of Respondent's business.

In view of the liberal interpretation of the Workmen's Compensation Act, it would be anything but equitable that

a helper engaged to assist a regular driver in the performance of his duties for the balance of a trip would not be entitled to workmen's compensation benefits, but that only the regular driver would be. Unquestionably this would be most strongly urged by Petitioner's counsel if a like finding in favor of one occupying the status of decedent Ormsbee, were being objected to by Respondent in a workmen's compensation proceeding.

3. At all times prior to the petition to this Honorable Court, Petitioner has contended only that, *as a matter of law* (on the basis of certain authorities cited by Petitioner and rejected by the Court of Appeals as inapposite), Ormsbee's employment was not in the regular course of Respondent's business. Petitioner has heretofore not contended that the jury was not permitted to pass on the factual basis for "regular course".

In fact, throughout the trial, Petitioner's counsel wholeheartedly agreed with the Trial Judge that the applicability of the Workmen's Compensation Act was solely a question of law (see Record, 61a, and 173a).

II.

In his reply brief Petitioner stresses the fact that "The jury had never been advised that the Compensation Act was being relied on by Respondent to block recovery." But, as heretofore noted, at the trial Petitioner was perfectly satisfied in that regard, for the record shows (195a) that at the conclusion of the Court's charge Mr. Gornall, on behalf of Petitioner, stated: "We have no corrections or objections, your Honor."

Respondent, on the other hand, specifically sought to bring the applicability of the Workmen's Compensation

Act before the jury by its Seventh Point for charge, the refusal of which was specifically excepted to by Respondent (197a).

The aforesaid request for charge by Respondent (appearing in the certified record before this Court at page 2 of Appellant's (Respondent's) Answer to Appellee's (Petitioner's) Petition for Rehearing and Stay of Mandate) reads as follows:

> "*If you find* that an emergency actually existed which justified the driver, Schroyer, in hiring an assistant *to help him with the work that Schroyer was required to do for Aetna Freight Lines, Inc.* and Schroyer did hire Ormsbee for this purpose, then your verdict must be for the Defendant in this case because the Pennsylvania Workmen's Compensation Act provides the exclusive remedy for injury or death in such a circumstance."

The Court of Appeals, by its decision in this case, has already determined that the foregoing point (which required a *factual* determination by the jury) correctly states the Pennsylvania law; and this Court has frequently stated that the basic task of Courts of Appeal is to interpret state law.

After excepting to the refusal of its point, what possible additional instructions could Respondent have submitted? It is submitted that whether an activity was in the regular course of an employer's business, could not be more clearly submitted to a jury in laymen's language than by an inquiry as to whether it was the type of work a regular employee was required to do.

Furthermore, the Trial Judge clearly showed that he understood Respondent's position when he stated, immediately after refusing Respondent's remaining points (including the 7th) (166a):

"I am not going to speak on Workmen's Compensation. I don't think Workmen's Compensation has anything to do with this case. If they find it was necessary to hire him—well, wait a minute; I am not going to say anything."

On the basis of the very authorities cited by Petitioner, he, not having excepted to any part of the Court's charge, should not be entitled to a new trial.

In the final analysis, Respondent submits that the controlling point in this case is that Petitioner, in his own proof, established the factual basis of emergency employment in the regular course of Respondent's business. Consequently, Respondent contends that the situation is exactly analogous to one where a plaintiff's own case discloses his contributory negligence. Certainly, such a plaintiff cannot sustain a jury's verdict in his favor on the ground that contributory negligence is an affirmative defense and defendant failed to prove plaintiff's contributory negligence by defendant's evidence. Here, Petitioner, having proved the factual basis for application of the Workmen's Compensation Act, should bear the consequences; although the holding of the Court of Appeals may be of immeasurable benefit to other workmen's compensation claimants and also to Petitioner here, inasmuch as Petitioner's claim for workmen's compensation is still pending.

Respectfully submitted,

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